

## Remarks

In the office action mailed January 30, 2009, the Examiner rejected claim 40 under 35 U.S.C. § 101. The Examiner also rejected claims 21-40 under 35 U.S.C. § 103 as being allegedly unpatentable over U.S. Patent No. 7,082,107 (“Arvelo”) in view of U.S. Patent Application Publication No. 2006/0182030 (“Harris”). Applicants have reviewed the cited art and requests favorable reconsideration in view of the following remarks.

Currently pending are claims 21-40. Of these claims, claims 21, 26, 36, 37, and 40 are independent, and claims 22-25, 27-35, and 38-39 are dependent.

### I. Response to Rejection of Claims under 35 U.S.C. § 101

In rejecting claim 40 under 35 U.S.C. § 101, the Examiner quoted a portion of paragraph [0028] of the specification as defining “computer readable medium” to include non-statutory signals. Applicants respectfully submit that paragraph [0028] does not indicate that the computer readable medium includes signals. The last sentence of paragraph [0028] states, “[i]f such is the case, it is within the scope of the present invention that such **instructions** may be stored on one or more processor readable carriers (e.g., a magnetic disk), or transmitted to one or more processors via one or more signals.” (Specification, para. [0028], emphasis added).

As such, the specification indicates that, in addition to being stored on a processor readable carrier, the instructions themselves could be transmitted to a processor via a signal. Thus, the mention of signals in paragraph [0028] describes an alternate way of sending instructions to a processor, but does not define a computer-readable medium to include signals. Further, claim 40 recites a “computer readable storage medium encoded with instructions,” thus

indicating that the instructions are stored on a statutorily permissible structure. Consequently, Applicants respectfully submit that claim 40 complies with the requirements of 35 U.S.C. § 101.

## **II. Response to the Rejection of Claims under 35 U.S.C. § 103**

The Examiner rejected claims 21–40 under 35 U.S.C. § 103 as being allegedly unpatentable over U.S. Patent No. 7,082,107 (“Arvelo”) in view of U.S. Patent Publication No. 2006/0182030 (“Harris”). Applicants respectfully submit that the cited references cannot form the basis for a *prima facie* case of obviousness for any of the newly added claims because the combination of the limited teachings of the cited references fails to establish rational underpinnings supporting a conclusion that the pending claims were obvious at the time of invention. (*See* M.P.E.P. § 2142). In particular, the combination of the cited references fails to teach re-transmitting a particular plurality of packets in response to determining an error rate.

Independent claim 21 recites “responsive to determining the first error rate, re-transmitting the previously transmitted plurality of packets at a second output power, wherein the second output power is different from the first output power.” Independent claims 26, 36, 37, and 40 recite similar language. *See* claim 26 (“responsive to determining that the first error rate is greater than the predetermined error rate value, re-transmitting the plurality of previously transmitted packets at a second output power”); claim 36 (“cause the transmitter to re-transmit the plurality of previously transmitted packets at a second output power in response to determining the first error rate”); claim 37 (“means for re-transmitting the plurality of previously transmitted packet at a second output power in response to determining the first error rate, wherein the second output power is different from the first output power”) and claim 40 (“responsive to determining the first error rate, re-transmitting the plurality of previously

transmitted packets at a second output power, wherein the second output power is different from the first output power"). None of the asserted references, alone or in combination, teach these claim limitations.

Applicants submit that the combination of Arvelo and Harris does not reasonably or logically lead to the claimed methods and systems recited by any of the independent claims. Arvelo and Harris fail to disclose re-transmitting a plurality of data packets in response to determining an error rate. At most, Arvelo teaches potentially re-transmitting a single packet in response to receiving a negative acknowledgment (NACK) from a receiver that has performed a cyclic redundancy check on that particular packet. (*See Arvelo*, col. 5, ln. 20-36). As set forth in Arvelo, the NACK messages are used to identify specific, individual packets with errors. According to Arvelo, the receipt of a NACK message is what is "used so that the transmitter will know to re-transmit the data in the packet that had the error." (Arvelo, col. 5, ln. 34-36). As such, the re-transmission in Arvelo is neither based on nor in response to the determination of an error rate.

Beyond predicating re-transmission of individual packets on the receipt of a NACK, and not on the determination of an error rate, Arvelo also fails to teach re-transmitting any data that was not erroneously received. As stated above, Arvelo uses a NACK to identify packets for re-transmission, and does not describe any instances of re-transmitting packets that are not associated with a NACK. In contrast, the pending independent claims each describe re-transmitting the plurality of previously transmitted packets. In particular, the plurality of packets transmitted at a first output power is re-transmitted at a second output power. Unlike Arvelo, where only packets identified as erroneously received are candidates for re-transmission, the pending independent claims each describe a re-transmission of the whole plurality of packets.

Harris similarly fails to describe re-transmitting a plurality of previously transmitted packets at a different power level in response to the determining of an error rate. Like Arvelo, Harris only teaches the re-transmission of individual, erroneously received packets in response to the receipt of a negative acknowledgement (NAK). (See Harris, para. [0039], [0052]-[0054]). Thus, unlike the pending independent claims, the re-transmission in Harris is not in response to the determination of an error rate. Harris is also commensurate with Arvelo in that only individual packets that are associated with a NAK are re-transmitted. Harris does not teach re-transmitting the plurality of packets as set forth in the pending independent claims.

Thus, Applicants submit that the combination of Arvelo and Harris does not reasonably lead to the methods and systems described in the independent claims, and thus cannot establish a *prima facie* case of obviousness for independent claims 21, 26, 36, 37, and 40. In addition, and without conceding any of the Examiner's other statements, Applicants respectfully submit that claims 22-25, 27-35, and 38-39 are allowable for at least the reason that they depend from an allowable dependent claim.

### **III. Conclusion**

Applicants respectfully submit that all of the claims are patentable over the cited art. The Examiner is invited to call the undersigned at (312) 913-0001 with any questions or comments.

Respectfully submitted,  
**McDonnell Boehnen Hulbert & Berghoff LLP**

Date: April 30, 2009

By: /Robert J. Irvine/

Robert J. Irvine.  
Reg. No. 41,865